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Exploring Precedent

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Recommended Citation

Mary Whisner, *Exploring Precedent*, 107 LAW LIBR. J. 605 (2015), <https://digitalcommons.law.uw.edu/librarians-articles/17>

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Practicing Reference . . .

Exploring Precedent*

Mary Whisner**

Ms. Whisner looks at the concept of precedent in the case law arena and discusses how to handle cases from parallel and lower courts, including unpublished decisions. She offers tips to help make decisions when using precedent, including consulting secondary sources and key numbers.

The apparent professional certainty regarding precedent may make it surprising for a current or former law student to discover that legal scholars have long acknowledged that the meaning and operation of precedent within our legal system are actually dimly understood and under-studied.¹

¶1 We all work with cases all the time.² Indeed, we have many powerful tools for finding cases: full-text searching with different interfaces from different providers, annotated statutes, digests, and a wide variety of secondary sources. Once we find cases, we can print them out or put them in electronic folders, annotating and highlighting them with pencil and ink or with clicks and taps. We know how to work with cases. But recently I've explored the field of precedent and found marshy spots instead of firm ground. In this column, I'll walk you around and show you some of the interesting spots I've explored.

* © Mary Whisner, 2015. I am grateful to Mary Hotchkiss and David Ziff for helpful comments on a draft.

** Reference Librarian, Marian Gould Gallagher Law Library, University of Washington, Seattle, Washington.

1. Scott Hamilton Dewey, *How Judges Don't Think: The Inadvertent Misuse of Precedent in the Strange Career of the Illinois Doctrine of Antagonistic Defenses, 1876–1985*, 2011 J. JURIS. 59, 60.

2. I write as someone steeped in U.S. law, but nearly any legal researcher would need access to cases. Cases are just as important in other common-law countries, of course. And cases are a source of international law. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031, 1060 (including judicial decisions as means of determining rules of international law). *But see id.* art. 59, 59 Stat. at 1062 (stating that decisions of the I.C.J. have “no binding force” except between the parties in the dispute adjudicated). Even in civil law systems, it is important to be able to find and use precedent. *See, e.g.,* John O. Haley, *The Role of Courts in “Making” Law in Japan: The Communitarian Conservatism of Japanese Judges*, 22 PAC. RIM L. & POL’Y J. 491, 491 (2013) (“Despite some scholarly dissension as to the theory of judicial precedent as a source of law, adherence to judicial precedent is well-established in law and practice, touching nearly all fields of Japanese law.”).

A Very Basic Picture

¶2 A precedent is a written³ opinion that states one or more legal rules used in solving that dispute; these rules might then be used to solve a later dispute.⁴ An advocate cites precedents to a court to support a position, hoping that the court will rule in favor of the advocate's client. In turn, a court cites precedents to justify its ruling, explaining to litigants, higher courts, the public, and history how it reached the result it did.⁵

¶3 Precedents are not created equal, varying in weight and relevance. A case's authority depends on the deciding court's place in the judicial hierarchy, as viewed from the court where the later case is being heard. If you have a case in a state trial court, then you look for precedents from that state's highest court and intermediate appellate court as well as the U.S. Supreme Court. Such precedents are said to be binding on the lower court. All other precedents are said to be nonbinding or (merely) persuasive.

¶4 I think people easily grasp this idea of having to follow the rules laid down by courts that are higher up. It's like a military hierarchy or an organizational chart at work. But it's harder to figure out what to do with precedents from courts at the same level. Does one division of a court of appeals have to follow precedent set by another? Does it try to if it can? For that matter, is an appellate court bound by its own precedent? This is a class of questions served well by the West Key Number System. It's hard to construct a good full-text search because thousands of cases use words like "court," "opinion," and "precedent." But the Courts topic leads us to the cases we need (see figure 1).⁶ You may also find helpful secondary sources for your jurisdiction.⁷

3. In the United States, judges write their opinions, but "[t]his practice provides a stark contrast to the English tradition, in which appellate judges historically issued the majority of their judgments orally from the bench at the conclusion of oral argument." Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1162–63 (2004).

4. Determining what rules a case creates is not always simple. See Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1738, 1744–46 (2013). The central question in Steinman's article is: "Does stare decisis obligate future courts to follow the *explicit rules* stated by the precedent-setting court in its opinion? Or is the obligation an implicit one, where future courts must *infer* a justification for the precedent-setting decision that reconciles the result with decisions going forward?" *Id.* at 1740. He argues for the former.

5. Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 486–88 (2015) (footnotes omitted):

Judicial reason-giving has not, however, always been considered so clearly desirable. Reason-giving is a typically modern idea. There have been historical moments when it was deemed valuable not to give reasons. . . . To this day, reason-giving is discouraged or even prohibited in a number of decision-making contexts, such as those involving juries, voters, clemency decisions, or national-security affairs.

6. For federal courts' use of state precedents, see Federal Courts > XV. State or Federal Laws as Rules of Decision; Erie Doctrine > k3006-k3010 Sources of Authority. You might also find useful headnotes under Appeal and Error > XII. Briefs > k761 Points and Arguments. And for state courts' deference (or not) to lower federal courts, see Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53 (2015).

7. For Washington State (the jurisdiction about which I get the most questions), see Mark DeForrest, *In the Groove or in a Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 GONZ. L. REV. 431 (2013); Kelly Kunsch, *Stare Decisis—Everything You Never Realized You Need to Know*, 52 WASH. ST. B. NEWS, Oct. 1998, at 31.

Figure 1

Excerpt from Topic 106, Courts; Section II, Establishment,
Organization, and Procedure

(G) RULES OF DECISION, k87-k99

★ Add to Favorites

87 Nature of judicial determination

88 Previous decisions as controlling or as precedents

- 89 —In general
- 90 —Decisions of same court or co-ordinate court
- 91 —Decisions of higher court or court of last resort
- 92 —Dicta
- 93 —Rules of property
- 95 —Decisions of courts of other state
- 96 —Decisions of United States courts as authority in other United States courts
- 97 —Decisions of United States courts as authority in state courts
- 98 —Decisions of courts of other countries
- 98.5 —Decisions of other courts as authority in tribal courts

99 Previous decisions in same case as law of the case

- (1) In general
- (2) Rulings on pleadings
- (3) Jurisdiction, dismissal, nonsuit, and summary judgment, rulings relating to
- (4) Interim relief, rulings relating to
- (5) Trial or evidence, rulings relating to
- (6) Other particular matters, rulings relating to
- (7) Different courts or judges, rulings by

Source: WestlawNext, Aug. 5, 2015

This summer a student needed information about precedent in Indiana courts. In addition to using the Key Number approach, we found something useful in an encyclopedia. 7 IND. LAW ENCYC. Courts § 37 (West, Westlaw, updated July 2015) (citing *Lakes v. Grange Mut. Cas. Ins. Co.*, 944 N.E.2d 509 (Ind. Ct. App. 2011), *vacated*, 964 N.E.2d 796 (Ind. 2012)). The case the encyclopedia cited for the proposition that Indiana courts do not recognize horizontal stare decisis had not turned up in our Key Number search because it had no headnotes. But the PDF of the published version does include Courts k90(2). When I checked with Westlaw, I learned that the headnotes had been removed when the Indiana Supreme Court vacated the court of appeals case. E-mail from Lori Hedstrom, Nat'l Manager, Librarian Relations, Thomson Reuters, to author (Aug. 7, 2015, 6:09 AM CST) (on file with author). It's interesting, because one might still want to be able to locate that case. It could be cited for the stare decisis proposition (which the higher court didn't address) with the history "*vacated on other grounds.*" Or one could cite the case it cites—*In re C.F.*, 911 N.E.2d 657, 658 (Ind. Ct. App. 2009) ("This Court is respectful of the decisions of other panels . . . Indiana does not, however, recognize horizontal *stare decisis*. Thus, each panel of this Court has coequal authority on an issue and considers any previous decisions by other panels but is not *bound* by those decisions."). (This one does have searchable Key Numbers.) A West editor plans to replace the vacated case with *In re C.F.* E-mail from Lori Hedstrom, Nat'l Manager, Librarian Relations, Thomson Reuters, to author (Aug. 12, 2015, 5:34 AM CST) (on file with author).

¶5 Relevance is much harder to diagram than a court hierarchy. You'd like a clear statement of a rule, applied to facts very much like the facts in your case. But "likeness" is notoriously vague. While it seems clear to you that the facts of your case line up quite nicely with precedent A, your opposing counsel might find precedents B and C with facts that are also arguably like yours.⁸ And then you have the challenge of explaining how A is a great fit while distinguishing the other two cases from yours.

¶6 A brief writer would love to have nothing but cases from higher courts in the correct jurisdiction—that is, binding precedents—that are highly relevant, unambiguous, and favorable to the client's position. Instead, what the researcher sometimes finds are binding cases that might apply, binding cases that seem to apply but are unfavorable, cases that are binding but aren't particularly relevant, and cases that seem to fit but are not binding. And so advocates and judges sometimes turn to precedent that is far afield (either geographically or topically), looking for something that can provide guidance. Legal writers must apply analysis and rhetorical skills in choosing which precedents to cite and how to weave them into an argument. Advocates may also leave the realm of precedent far behind, citing encyclopedias, treatises, and law review articles.⁹

Nonlegal Sources

¶7 To provide facts, color, or flair, lawyers and judges can cite newspapers,¹⁰ Wikipedia,¹¹ or rock lyrics,¹² as well as works of literature. A more powerful reason is that the nonlegal reference can "anchor[] an argument in shared experience, common sense and general human values."¹³ In the absence of precedent determining the result, reference to a novel, a movie, or a folk tale could make one outcome seem reasonable and fair.

8. One author spins out a hypothetical about luggage lost on an overnight ferry. One precedent is about luggage lost on an overnight train; another is about luggage lost in a hotel. Is the ferry cabin more like a hotel room or a train car? Dan Hunter, *Reason Is Too Large*, 50 EMORY L.J. 1197, 1206–10 (2001).

9. See Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 307 (2000):

Modern courts can be innovative, but judges are reluctant to pick ideas entirely out of thin air. It's always much safer to follow some precedent, preferably an opinion by a prestigious court or at least a well-known judge. But, alas, there is a point in the development of any legal doctrine where there is no judicial precedent; some court has to be the first. That is a very uncomfortable position for a judge to be in: You write an opinion and have nothing to cite. Paradoxically, opinions are not supposed to be a matter of opinion; they are supposed to reflect the law, and this means at least someone out there who does law is supposed to agree with you.

10. See Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495 (2000) (documenting use of newspapers and general interest books by courts).

11. See Joseph L. Gerken, *How Courts Use Wikipedia*, 11 J. APP. PRAC. & PROCESS 191 (2010); Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1 (2009–2010).

12. See, e.g., Alex B. Long, *The Freewheelin' Judiciary: A Bob Dylan Anthology*, 38 FORDHAM URB. L.J. 1363 (2011). "Judges at all levels in the United States judicial system have cited Bob Dylan far more often than any other popular music artist." *Id.* at 1365.

13. E-mail from Professor David Ziff, Univ. of Wash. Sch. of Law, to author (Aug. 30, 2015, 5:05 PM PST) (on file with the author).

¶8 One Saturday afternoon, I pursued my curiosity about literary citations in briefs. I searched in WestlawNext's Briefs database, looking for famous authors' names to appear within 100 words after "authorities"—that is, trying to find items listed in a brief's table of authorities. (Of course, this search could miss some relevant briefs, for instance, if there were a lot of cases and statutes between the table of authorities heading and the literary references.) It won't be much of a surprise that William Shakespeare has been cited often, with 126 documents.¹⁴ I did a tally of the plays, finding that *Hamlet* was the most frequently cited (the phrase "doth protest too much"¹⁵ alone appeared in 17 briefs). See table 1. Mark Twain is fairly well represented, but you have to weed out citations where "Mark Twain" is part of the case name—e.g., *Mark Twain Kansas City Bank v. Kroh Brothers Development Co.*¹⁶ One brief manages to cite both the movie *Casablanca* and *The Complete Calvin and Hobbes*.¹⁷ I don't know about the merits of the case, but I think I'd enjoy having coffee with that lawyer.

¶9 When to cite nonlegal sources is a question of judgment and taste. Surely you shouldn't squander scarce space in your brief on Shakespeare if you haven't handled your substantive argument with all the binding, relevant authority you can muster. And always think of your audience: there might be some judicial readers who don't find references to comic strips—even the amazing "Calvin and Hobbes"—at all helpful or amusing. But it's up to the writer.

Rules Against Citing Unpublished Opinions

¶10 In a world where litigants can cite Dr. Seuss,¹⁸ it might seem odd that courts prohibit citing certain cases that they themselves decided.¹⁹ But it's true: the federal

14. Search in WestlawNext Briefs, June 27, 2015: **authorities +100 "William Shakespeare."** Bear in mind that this search won't pick up all citations—and that even Westlaw's large collection of briefs is limited. Selective coverage of U.S. Supreme Court briefs begins in 1930. Briefs from the federal courts of appeals begin in the 1970s and 1980s, except for the Tenth Circuit, which begins in 2000. I've just looked at the scope screens for five states: Alabama (2001), Alaska (2002), Arizona (1999), Arkansas (2001), California (1988). I'm pretty confident that coverage of the other states is also limited.

15. "The lady doth protest too much, methinks" is spoken by the Queen in *Hamlet*, act III, sc. i.

16. 798 P.2d 511 (Kan. Ct. App. 1990).

17. Appellants' Reply Brief at 1 n.2, 12 n.22, *Carr-Gottstein Foods Co. v. Wasilla, LLC*, No. S-13434 (Alaska Nov. 25, 2009).

18. Search in WestlawNext Briefs, June 27, 2015: **authorities +100 "dr seuss" % "dr seuss enter!"** (This search eliminates the cases involving Dr. Seuss Enterprises.) Result: sixteen documents. Fans of Dr. Seuss might be interested in the symposium *Exploring Civil Society Through the Writings of Dr. Seuss*TM, 58 N.Y.L. SCH. L. REV. 495–705 (2013–2014). (I don't know why the editors needed to use the trademark sign, but they did.)

19. See William T. Hangle, *Opinions Hidden, Citations Forbidden: Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 669 (2002):

If one does not think of the nonbinding opinions as "precedents," but merely as the recorded thoughts of sapient scholars, the common law tradition is that they can be cited as persuasive tools, just as the thoughts of Coke or Lewis Carroll, of Yogi Berra or Jonathan Swift, are so frequently cited in briefs and opinions.

See *Shady Records, Inc. v. Source Enters., Inc.*, 371 F. Supp. 2d 394, 398 n.1 (S.D.N.Y. 2005) (Lynch, J.):

As the Court has frequently had occasion to remark, a district court must seek enlightenment as to the law where it finds it. If it is permissible to cite and to treat as persuasive authority the writings of law students in student-edited journals, the considered opinion of a panel of appellate judges

Table 1

Shakespeare Plays Cited In Briefs, In Order of Times Cited

Title of Play	Times Cited
<i>Hamlet</i>	42
<i>Romeo and Juliet</i>	18
<i>Macbeth</i>	15
<i>The Merchant of Venice</i>	8
<i>Othello</i>	8
<i>Julius Caesar</i>	5
<i>Henry V</i>	4
<i>Measure for Measure</i>	4
<i>Henry IV Part 2</i>	3
<i>The Comedy of Errors</i>	2
<i>Henry VI Part 2</i>	2
<i>A Midsummer Night's Dream</i>	2
<i>Much Ado About Nothing</i>	2
<i>The Tempest</i>	2
<i>Antony and Cleopatra</i>	1
<i>Henry IV Part 1</i>	1
<i>Henry VI Part 1</i>	1
<i>King John</i>	1
<i>King Lear</i>	1
<i>Richard II</i>	1
<i>The Taming of the Shrew</i>	1
<i>Titus Andronicus</i>	1
<i>Twelfth Night</i>	1

courts and many state courts have rules limiting the citation of unpublished opinions.²⁰ They simply declare that some decisions are not precedent. In some jurisdic-

including Chief Judge Walker and Judges Oakes and Leval, uttered not in academic speculation but in entering judgment resolving a litigation by affirming a judgment for over \$50,000, must surely be considered a valuable source of wisdom.

See also *Harris v. United Fed’n of Teachers*, New York City Local 2, No. 02-Civ.3257(GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002) (Lynch, J.).

20. See Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349 (2004) (providing chart of publication and citation rules in federal and state jurisdictions). I wish I had a more current survey of the states, but I don’t. You can take my word for it that many states still have rules forbidding citation of unpublished opinions. Or you can run a search. For instance, in WestlawNext, Statutes & Court Rules, on Aug. 5, 2015, I searched for: **cited citation citable citing /s unpublished** and found many such rules. See, e.g., WIS. STAT. ANN. § 809.23(3) (West, Westlaw through 015 Act 20, published 05/21/2015);

tions, litigants may even be sanctioned for citing an unpublished opinion.²¹ To be fair, there are characteristics of unpublished decisions that might make citing them riskier than citing Dr. Seuss:

The word of a federal Court of Appeals will not be treated as a law review article or newspaper column, no matter how many admonitions from the appellate court that its unpublished opinions have no precedential authority. Every judge and lawyer in America has internalized the hierarchical nature of our justice system; the word of a federal Court of Appeals, even unpublished, will not be treated the same as the word of a legal scholar or newspaper columnist.²²

¶11 Access to unpublished decisions used to be very limited. When I first heard (in the 1980s) about rules against citing unpublished opinions, people were concerned about potential unfairness. Institutional litigants such as government agencies would have access to the opinions in their own areas. Wealthy law firms would have access on LexisNexis and Westlaw. But low-budget law practices and pro se litigants wouldn't.²³ Now the economics have changed. Many public law libraries

(a) An unpublished opinion may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of the case, and except as provided in par. (b).

(b) In addition to the purposes specified in par. (a), an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

(c) A party citing an unpublished opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.

21. The risk of sanctions doesn't appear to be great, though. *See, e.g.,* Condon v. Condon, 298 P.3d 86, 93 (Wash. 2013) (denying sanctions); O'Neill v. City of Shoreline, 332 P.3d 1099, 1105 (Wash. Ct. App. 2014) (denying sanctions); *In re Perthou-Taylor*, No. 70953-4-I, 2014 WL 4347655, at *9 (Wash. Ct. App. Sept. 2, 2014) (denying motion for sanctions); *State v. Akins*, No. 2013AP447-CR, 2014 WL 2842012, at *4 n.4 (Wis. June 4, 2014) (reminding counsel to comply with the rule and citing a 1982 case in which counsel was fined \$50); *Household Fin. Corp. III v. Kennedy*, No. 2011AP2658, 2013 WL 791394, at *2 n. 2 (Wis. Mar. 5, 2013) ("We note both parties cite unpublished decisions in their briefs to this court. We admonish the parties that improper citations to unpublished opinions in the future may result in sanctions.")

22. Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *FORDHAM L. REV.* 23, 42 (2005). Schiltz also suggests that the judges who write opinions they declare not to have precedential value would be affected by the possibility of their being cited. *Id.* at 41. "As one judge wrote, 'Shakespearean sonnets, advertising jingles and newspaper columns are not, and cannot be mistaken for, expressions of the law of the circuit. Thus, there is no risk that they will be given weight far disproportionate to their intrinsic value.'" *Id.* (citing Letter from Alex Kozinski, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, to Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules 4 (Jan. 16, 2004), available at http://www.secretjustice.org/pdf_files/Comments/03-AP169.pdf (Comment 03-AP-169)).

23. *See Proceedings of the Forty-Third Annual Judicial Conference of the District of Columbia Circuit*, 96 F.R.D. 245, 314 (1982) (remarks of attorney Irving Jaffe):

The equal access inequity exists to some extent now. It exists, for example, in the access that some law firms, because of their location, have to such sources as legislative history, legislative reports, and Congressional hearings. These sources are not readily available in some areas of the country where they don't have a large library which stocks or keeps these things. Some lawyers cannot afford access to electronic retrieval systems. Other law firms do. I'm not so sure that unequal access doesn't already exist, so that it is not the big factor that it sounds like on its face.

provide access to LexisNexis or Westlaw. By virtue of their bar memberships, most lawyers have access to Fastcase or Casemaker. And many cases are available on free websites. In fact, getting an electronic copy of an unpublished opinion is generally easier than putting hands on an official print reporter.

¶12 The literature on unpublished decisions is vast. I only got a sense of how vast when I set out to update a couple of footnotes in *Fundamentals of Legal Research*. The prior edition discussed the issue in two places, with long string citations that overlapped but didn't entirely duplicate each other.²⁴ I thought I should update the footnotes and consolidate the discussion. The problem was that the more I looked, the more I found. I created a spreadsheet listing scores of articles and posted it on SSRN.²⁵ That enabled me to streamline the footnotes, citing Joseph Gerken's excellent overview,²⁶ a couple of other works with overviews, and—for the readers who really want to explore the issue—my bibliography on SSRN.²⁷

¶13 The controversy over case publication is of long standing. At the turn of the last century, bar committees decried the growth in reports but didn't agree on the remedy. For instance, in 1903, a majority of the Committee on Law Reporting and Digesting recommended that not all opinions be published.²⁸ In 1916, the Special Committee on Reports and Digests recommended that all opinions of each state's court of last resort be published, as well as all written federal court of appeals opinions and those district court cases that weren't appealed.²⁹ This committee's report was accompanied by a summary of correspondence, showing the views of lawyers who responded, along with constitutional or statutory provisions about case publication.³⁰ A range of views was expressed. For example, "Too Many Cases":

- Alabama: "Lawyers want every case they win reported whether it involves any new point or not. They present every point involved whether new or not, and complain on rehearing if it is not discussed. . . . The court ought to be the judge of the decisions to be published at length."³¹

Jaffe mentioned a Tenth Circuit rule that mitigated the access problem by offering a \$5 subscription to an index of its published opinions. *Id.* Judge Patricia M. Wald commented that her clerks often could locate unpublished opinions from her own court. *Id.* See also Hangle, *supra* note 19, at 647:

[A]ll circuits should release their opinions for publication in Lexis, Westlaw, and other internet carriers. The growth of the law cannot help but be stunted if the great majority of decisionmaking is occult. Worse yet, the present system in some circuits invites "organized litigants"—government agencies or special interest groups, by way of example—to build archives of the unpublished opinions and gain an unfair advantage.

24. STEVEN M. BARKAN ET AL., *FUNDAMENTALS OF LEGAL RESEARCH* 35 nn.7–8, 57 n.23 (9th ed. 2009) (chapters on court reports and federal court reports).

25. Mary Whisner, *Unpublished Opinions: A Working Bibliography* (Aug. 4, 2015), <http://ssrn.com/abstract=2306184>.

26. Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 LAW LIBR. J. 475, 2004 LAW LIBR. J. 28.

27. See STEVEN M. BARKAN ET AL., *FUNDAMENTALS OF LEGAL RESEARCH* 43 nn.12–14 (10th ed. 2015).

28. Am. Bar Ass'n Comm. on Law Reporting & Digesting, *Report of the Committee on Law Reporting and Digesting*, 26 ANN. REP. A.B.A. 456, 458–59 (1903).

29. Am. Bar Ass'n Spec. Comm. on Reports & Digests, *Report of the Special Committee on Reports and Digests*, 2 A.B.A. J. 618, 622, 624–25 (1916).

30. *Id.* at 626–56.

31. *Id.* at 626.

- Alaska: “We have too much case law in this country. The average lawyer, instead of doing the original thinking for reasons upon which to base his contention, is so desirous of winning his suit he spends the greater portion of his time looking for some similar case in the hope that it may be accepted as precedent.”³²
- Arkansas: “In this state there are no serious defects, except the failure of the court to exercise its discretion as to which opinions shall be published.”³³

And, in contrast:

- Delaware: “All opinions should be reported.”³⁴
- Washington: “The increasing number of decisions is one of the phenomena indicating the complexity of modern life. It is yet to be demonstrated that we cannot get along better by use of reports containing all the decisions of courts of last resort than by attempting to dam the stream at its source. A partial remedy would be to persuade the courts to cease writing essays when they decide cases.”³⁵

¶14 In 2006, the Federal Rules of Appellate Procedure were amended to require circuits to allow citation of unpublished opinions issued after January 1, 2007—but the rule is still not “anything goes.” The circuits can still restrict citation to earlier cases and may designate that unpublished opinions will not have precedential value.³⁶ And there are the states. But even though state appellate courts handle almost five times as many cases as the federal courts of appeals,³⁷ the bulk of the law review articles are about publication and citation rules in federal courts. So it goes.³⁸

32. *Id.*

33. *Id.* at 627.

34. *Id.* at 630.

35. *Id.* at 655–56. Sure there are a lot of cases. Deal with it.

36. See 16AA CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3978.10 (4th ed., West, Westlaw, updated July 2015) (footnote omitted):

Practitioners should note Rule 32.1’s limitations. It does not prescribe rules for determining when a decision should be published. It does not require courts to permit citation of unpublished opinions issued prior to 2007. And it does not prescribe the precedential value, if any, of unpublished opinions. Circuits take varying approaches to all these questions, and practitioners should be sure to consult the local rules of the relevant circuit.

37. State appellate courts had 269,219 incoming cases in 2012. *Appellate Court Caseload Trends 2003–2012*, NAT’L CTR. FOR STATE COURTS COURT STATISTICS PROJECT (2013), <http://www.courtstatistics.org/Appellate/2014Appellate.aspx>. Meanwhile, the federal courts of appeals had 57,501 cases filed in the year ending Sept. 30, 2012. Table 2.1—U.S. Courts of Appeals Judicial Facts and Figures (Sept. 30, 2012), U.S. COURTS, STATISTICS & REPORTS (2012), <http://www.uscourts.gov/statistics/table/21/judicial-facts-and-figures/2012/09/30>.

38. I think that law reviews publish more pieces on federal topics than on state topics, but I don’t have a good citation to support that claim. Authors who want a national audience will find it easier to write on a federal topic than to do the heavy lifting of examining the conflicting laws of all the states. Focusing on one state’s law is unlikely to score a placement in a top-tier journal and the benefits that come with it (e.g., tenure, favor with the dean, merit raises). Citation by courts and other scholars is probably more likely with a federal topic as well.

One critic charged that law review selection practices “reflect the interests of third-year law students looking forward to federal circuit court clerkships and practice in corporate law firms.” James Lindgren, *An Author’s Manifesto*, 61 U. CHI. L. REV. 527, 533 (1994). In a survey of student notes, civil procedure and federal courts “attracted the second-most notes among elite students,” but the non-elite journals surveyed had only one civil procedure note and none on federal courts. Andrew

Cases of First Impression

¶15 Has law become more settled? I came to this question in a roundabout way starting with a study by two student authors addressing the apparent declining use of law reviews by judges.³⁹ Thinking that secondary sources would be most useful to judges who faced new issues, they searched for citations to “L. Rev.” or “L.J.” in cases that also used the phrase “first impression.” It turned that there was a correlation: “first impression” cases *were* more likely to cite journal articles than other cases were. (It’s still a minority, but it’s a larger minority. For example, 1.5% to 3.0% of state court cases cited legal scholarship, but 5.6% to 11.4% of state cases with the phrase “first impression” did so.⁴⁰) The authors stated the one “objective reason that law reviews are apparently experiencing a decline in judicial citation is equally straightforward: the law is increasingly settled.”⁴¹

¶16 Some time after reading that, I wondered: is it true? Like the authors, I thought that “first impression” might be a good proxy for the extent that the law is settled. I ran a series of searches combining case /5 “first impression” with date ranges. This search is both over- and underinclusive. It’s overinclusive because judges sometimes use the phrase in other contexts.⁴² Sometimes they are saying that the case is *not* one of first impression.⁴³ The search is underinclusive because it misses phrases like “This is an issue of first impression”; “This is a question of first impression”; and “This case presents a novel question”—as well as other ways judges might express the concept.⁴⁴ But imperfect as the search is, I thought it was a good way to see whether cases of first impression might be more or less common than in the past. Even with a very imperfect search, the pattern is dramatic: the number of cases rose gradually throughout the nineteenth and early twentieth

Yaphe, *Taking Note of Notes: Student Legal Scholarship in Theory and Practice*, 62 J. LEGAL EDUC. 259, 282 (2012). Yaphe doesn’t distinguish between federal civil procedure and state civil procedure, but I suspect the notes were on federal civil procedure. See also James W. Paulsen, *An Uninformed System of Citation*, 105 HARV. L. REV. 1780, 1788 (1992) (reviewing THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (15th ed. 1991)) (“Basically, *The Bluebook* suffers from a bad case of federal parochialism—a pervasive belief that state courts simply are not important.”).

39. Whit D. Pierce & Anne E. Reuben, Empirical Study, *The Law Review Is Dead; Long Live the Law Review: A Closer Look at the Declining Judicial Citation of Legal Scholarship*, 45 WAKE FOREST L. REV. 1185 (2010).

40. *Id.* at 1225–26.

41. *Id.* at 1196.

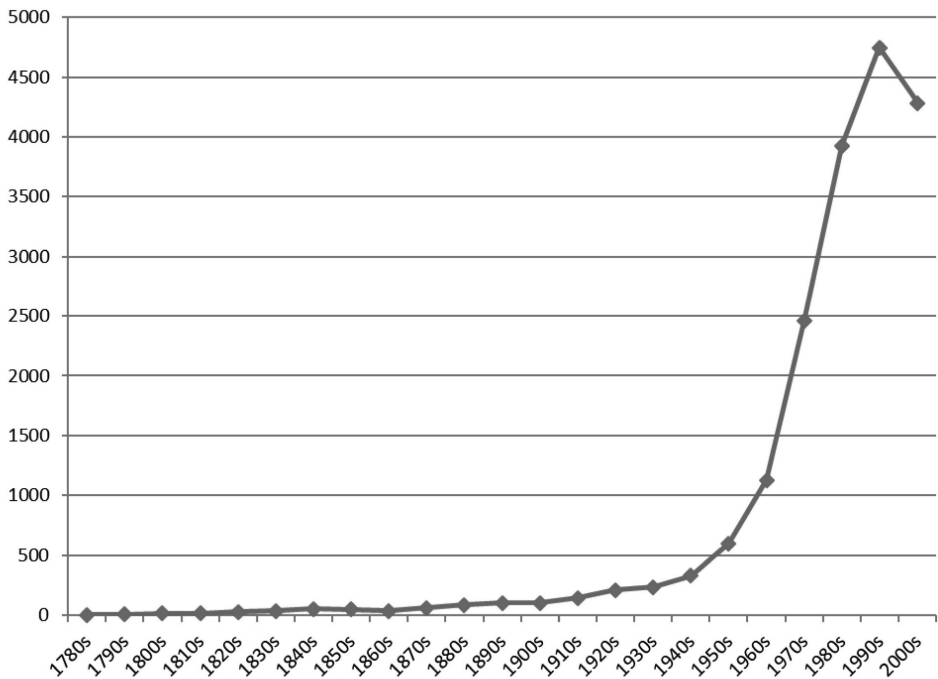
42. See, e.g., *Landry v. Seattle, P. A. & W. Ry. Co.*, 171 P. 231, 232 (Wash. 1918) (“Whereupon the judge, after more mature consideration, came to the conclusion that his first impression of the case was wrong . . .”).

43. See, e.g., *UnionBanCal Corp. & Subsidiaries v. U.S.*, 113 Fed. Cl. 117, 129–30 (2013) (“And this is neither a hard case nor one of first impression.”); *Aetna Life Ins. Co. v. Daniel*, 33 S.W.2d 424, 425 (Mo. Ct. App. 1930) (“If this were a case of first impression, we should be inclined to still hold to that view, but, upon a reconsideration of this case, we have concluded that the holdings of the Supreme Court, by which we are bound, establish the rule in this state that a suit in equity to cancel a life insurance policy cannot be maintained by the company after the death of the insured.”).

44. See, e.g., *People v. Laursen*, 99 Cal. Rptr. 841, 845 (Cal. Ct. App.), *vacated*, 501 P.2d 1145 (Cal. 1972) (“Aside from the decision in this case on the former appeal this combination or (sic) circumstances is unique and creates a problem of first impression.”); *Dunn v. Slemons*, 165 S.W.2d 203, 205 (Tex. Civ. App. 1942) (“We find no cases in Texas that interpret section 22 of article 6573a, Vernon’s Annotated Civil Statutes, on the precise question here involved . . .”).

centuries and then started climbing in the 1930s and 1940s.⁴⁵ The curve drops off a bit from the 1990s to the first decade of this century, but there were still more than 4000 cases in that last decade (see figure 2).⁴⁶

Figure 2
Occurrences of “Case” Within Five Words of “First Impression”
in U.S. Courts, by Decade⁴⁷



¶17 I looked through most of the 364 “first impression” cases from 2013, recording notes in a spreadsheet. I thought that I might sort by state and federal courts (are these cases more common in some jurisdictions?). I pasted in sentences so I could look at whether the cases were truly cases of first impression. But I lost steam and didn’t get through them all.

¶18 I did see enough to address the hypothesis that cases described as cases of first impression will tend to be interesting cases. In the sample, it appeared, to the

45. One factor in the steep rise might be an increase in cases overall. It might be interesting to look at “first impression” cases as a percentage of the cases reported in each time period.

46. For an overly optimistic prediction of the law becoming settled, see Edward P. White, *Changed Conditions in the Practice of Law*, 12 AM. LAW. 52, 53 (1904): “The development of the law moreover tends to render litigation unnecessary. Almost every question that arises has already been decided. The results of repeated decisions have been embodied in codes. When some new disorder arises, the legislature promptly regulates the matter by statute.”

47. Searches in WestlawNext All Cases (state and federal), following the pattern: case /5 “first impression” & da(aft1930) & da(bef1941). Searches performed May 3 and 4, 2015.

contrary, that many cases of first impression address narrow questions that are pretty darn dry. Here are a few examples:

- “The instant case presents a question of first impression as to the treatment of a Chapter 13 plan modification to surrender the debtor’s principal residence to the holder of a claim secured only by a security interest in the residence.”⁴⁸
- “This case raises a question of first impression in this circuit as to whether a retroactively conferred benefit during the course of employment constitutes a ‘benefit attributable to service’ and so an ‘accrued benefit’ for purposes of ERISA’s anti-cutback rule.”⁴⁹
- “This is a case of first impression involving an excess insurer’s attempt to recover from a primary insurer the amount contributed from an excess policy to resolve a claim where the primary insurer has allegedly failed to settle the claim within its policy limits in bad faith.”⁵⁰
- “The motion currently before the Court in this case presents an issue of first impression but little practical significance: when multiple witnesses are designated as corporate representatives pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, must a request to review and sign the deposition transcript be made on behalf of each witness, or does a single request satisfy the notice requirement of Rule 30(e)?”⁵¹

¶19 These issues are interesting to the parties and maybe to people who practice in those specialty areas. Maybe I could even find something interesting there if I took the trouble to read the cases carefully and figure out the puzzles presented. But their charm doesn’t leap off the page. On the other hand, some of the cases do pique my interest (and would probably interest others too). For example:

- “[W]hether a child can have a legal mother and two legal fathers appears to be a case of first impression in Illinois.”⁵²
- “This case, apparently one of first impression, involves the application of New York’s unlawful surveillance statute (see Penal Law § 250.45) to the prosecution of a defendant accused of video recording his sexual activities without the knowledge or consent of the other participants.”⁵³
- “This case presents an issue of first impression for this court—whether law enforcement owes a duty of care to fleeing suspects.”⁵⁴

48. *In re Bell*, No. 11-30402-H3-13, 2013 WL 6898251, at *2 (Bankr. S.D. Tex. Dec. 31, 2013).

49. *Bonneau v. Plumbers & Pipefitters Local Union 51 Pension Trust Fund ex rel. Bolton*, 736 F.3d 33, 34 (1st Cir. 2013).

50. *Scottsdale Ins. Co. v. Addison Ins. Co.*, No. WD75963, 2013 WL 5458918, at *1 (Mo. Ct. App. Oct. 1, 2013), *transferred to Mo. S. Ct. sub nom.* *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818 (Mo. 2014).

51. *In re Weatherford Int’l Sec. Litig.*, No. 11 CIV. 1646 LAK JCF, 2013 WL 4505259, at *1 (S.D.N.Y. Aug. 23, 2013).

52. *In re C.C.*, 1 N.E.3d 1238, 1254 (Ill. App. Ct. 2013).

53. *People v. Piznarski*, 977 N.Y.S.2d 104, 108 (N.Y. App. Div. 2013).

54. *Torrie v. Weber Cnty.*, 309 P.3d 216, 218 (Utah 2013).

¶20 Pondering what it means to be a case of first impression, I had this startling thought: instead of wondering why there are so many cases of first impression, why don't we ask why there aren't *more*? Think about it. If the law is clear, there shouldn't be much of a dispute. Both sides will read the relevant statutes and cases and know how it should turn out. So they shouldn't reach an appellate court. But of course, there *are* disputes and they do reach appellate courts. In some sense, every case presents a combination of facts and legal issues that hasn't been seen before: a case of first impression. Courts, however, reserve that label for cases that are "new" in a more significant way.

¶21 Two Dallas lawyers looked "for a practical meaning of the phrase 'first impression'" by surveying its use by Texas appellate courts for a twenty-month period.⁵⁵ Eliminating cases that used the phrase incidentally, they found that "the phrase signals certain types of argument, but does not preview the structure of the argument itself."⁵⁶ They also found (while acknowledging the smallness of their sample) that use of the phrase correlated with a higher reversal rate.⁵⁷ That makes some sense. Maybe it makes it easier to say the lower court got it wrong if you also say that available precedent didn't answer the question.

Conclusion

¶22 Starting with a very basic characterization of precedent, I have taken you on a selective tour of the neighborhood. One puzzle is how to handle cases that come from parallel courts or even lower courts. I offered tips for using Key Numbers and secondary sources to answer those questions. While in a system that calls on lawyers and judges to cite judicial precedent, we saw that they also cite secondary sources and nonlegal materials. And then we ventured into the confusing area of unpublished decisions. Are they precedents or aren't they? Why should we be able to cite *Dr. Seuss* but not a court decision? Finally, we stopped for a look at cases of first impression. Despite the accumulation of precedent, the use of the label "case of first impression" has soared—but the border between "cases of first impression" and regular cases isn't clear. Any of these areas could be explored in more depth than I have done. And there are doubtless many other areas in the land of precedent that are ripe for exploration. I plan to go on looking around. Will you? Get your compass and knapsack ready.

55. David S. Coale & Jeaneen M. Dyrek, *First Impressions*, 24 APP. ADVOC. 274 (2011).

56. *Id.* at 276.

57. *Id.* at 294.